

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
FairPoint Communications, Inc.)	WC Docket No. 10-90
Petition for Limited Waiver of)	
Section 54.312(c))	
of the Commission's Rules)	
)	
Notice Requirements of the Connect America)	
Fund, Phase I, Round 2)	

REPLY COMMENTS OF FAIRPOINT COMMUNICATIONS, INC.

FairPoint Communications, Inc. ("FairPoint") hereby replies to the comments of NCTA – the Internet & Television Association ("NCTA") in the above-captioned proceeding.¹ NCTA was the only party to comment on the FairPoint Petition for limited waiver of Section 54.312(c) of the Commission's rules² to submit to the Commission, *nunc pro tunc*, the census blocks and locations in which FairPoint deployed broadband to meet the requirements of the Connect America Fund ("CAF") Phase I, Round 2 support that FairPoint accepted in the Commonwealth of Virginia on behalf of its local exchange company Peoples Mutual Telephone Company ("PMTTC").

NCTA does not oppose the petition, nor does NCTA express concern that the erroneous identification of PMTC census blocks was anything other than an honest mistake. However, NCTA does not support the solution proposed by FairPoint, namely,

¹ *Wireline Competition Bureau Seeks Comment on Petition For Limited Waiver From FairPoint Communications, Inc.*, WC Docket No. 10-90, FCC Public Notice, DA 17-316 (WCB rel. April 4, 2017).

² 47 C.F.R. §54.312(c).

for the Bureau to conduct a challenge process, *nunc pro tunc*, to confirm whether any of the locations in the 185 previously unidentified census blocks were “served” within the meaning of the FCC’s rules and orders at the time FairPoint accepted CAF Phase I, Round 2 support. Instead, NCTA suggests that the Commission review FCC Form 477 data from 2013 to the present to determine if the 185 Virginia census blocks in question were “unserved” back in 2013, *and* whether any unsubsidized competitor deployed there in the meantime.³ If the census blocks were unserved in 2013 and remained unserved at the time FairPoint built out, FairPoint should keep the support dollars, according to NCTA, but otherwise FairPoint should be required to build elsewhere or refund the support.⁴

FairPoint agrees that if any of the *locations* in the 185 census blocks where FairPoint deployed broadband to satisfy its CAF Phase I, Round 2 obligations turn out to have been served at the relevant time, they can be disqualified, and FairPoint may be required to identify alternative locations to which it can deploy broadband or refund the support associated with those locations. FairPoint agrees with NCTA that for all locations *not* so disqualified, FairPoint should be permitted to keep the support associated with the locations where it deployed broadband in the 185 census blocks in question. But NCTA is incorrect in asserting that the data gathered in FCC Form 477 is the best way to resolve this question.

³ *Petition for Limited Waiver from FairPoint Communications, Inc.*, WC Docket No. 10-90, Comments of NCTA – the Internet & Television Association (filed May 4, 2017) at 3 (“NCTA Comments”).

⁴ *Id.* at 4.

First, the data collected by the Commission through FCC Form 477 in 2013 did not indicate the census blocks or locations where broadband was *available*, only the census blocks where a provider had *subscribers*. The FCC did not begin to collect information about broadband *deployment*, and thus availability, until 2014.⁵ Recipients of CAF Phase I, Round 2 support were required to identify their intended deployment locations and census blocks in 2013, and FairPoint did so based on the June 2012 National Broadband Map (“NBM”) and FairPoint’s good faith belief at that time that they were, in fact, “unserved” within the meaning of the Commission’s rules.⁶

Second, even if subsequent Form 477 data (2014 and later) indicated what census blocks were “served” at any point in time, they failed to identify which *locations* within those census blocks were served. Because of the over-inclusive nature of Form 477 data as well as NBM data, treating a census block as “served” if a single location in the census block was served, the FCC decided to permit carriers under the CAF Phase I, Round 2 rules to consider a location “unserved” if the underlying data supported this conclusion and they had no knowledge to the contrary.⁷

For both these reasons, NCTA’s proposed solution would be inconsistent with Commission rules and policies. To disqualify locations that *were unserved at the time*, where FairPoint timely deployed broadband in the good faith belief that they qualified

⁵ *Modernizing the Form 477 Data Program*, WC Docket No. 11-10, Report and Order, 28 FCC Rcd 9887, 9896-97 (2013).

⁶ See Petition, Attachment 1, Declaration of Michael Harrington.

⁷ *Connect America Fund, et al.*, WC Docket Nos. 10-90 *et al.*, Second Order on Reconsideration, 27 FCC Rcd 4648, 4651 (2012).

for support, would be inconsistent with FCC precedent and the stated purpose of CAF Phase I to stimulate immediate investment in broadband in unserved areas.⁸

NCTA argues that FairPoint’s error may have “precluded other providers from being aware that government-subsidized broadband would be offered in these [previously unidentified] census blocks. It is possible that, if they had known of FairPoint’s intention to use CAF Phase I support in these areas, providers instead would have deployed broadband in other, non-subsidized areas, meaning additional consumers would have access to broadband today.”⁹ FairPoint disagrees. The 185 census blocks in question were either entirely or partially unserved when FairPoint commenced construction. The locations themselves were unserved. To the extent that a competitor decided to deploy in the same census blocks, either it did so at different locations, in which case no other customers “lost out” on access to broadband, or it over-built FairPoint, in which case the competitors should have done their own due diligence prior to commencing construction – but that is not the concern of this Commission. While the FCC’s challenge process provides a useful tool for the incumbent local exchange carrier accepting CAF Phase I support (and the FCC) to ascertain if a competitor already served an area, and thus whether support could better be utilized elsewhere, the Commission never indicated any secondary intention of the challenge process to guide competitors’ deployment decisions. Nonetheless, FairPoint believes that its use of support in these 185 census blocks did not adversely affect any competitor.

⁸ *Connect America Fund, Phase I*, WC Docket No. 10-90, Report & Order, 28 FCC Rcd 7766, 7771 (2013).

⁹ NCTA Comments at 3.

*Reply Comments of FairPoint Communications, Inc.
Petition for Limited Waiver of Section 54.312(c)
Notice Requirements of the Connect America Fund, Phase I, Round 2*

As noted in the Petition, the error in identifying census blocks in the Virginia study area of Peoples Mutual Telephone Company was a technical one that occurred through a good faith error on the part of a FairPoint employee, and not in any attempt to circumvent the Commission's rule. FairPoint seeks no additional support but only what corresponds to the broadband build-out the company actually performed. In the absence of a waiver, FairPoint would have a substantial deficit of approximately \$575,000, causing a material adverse impact on future infrastructure investment and therefore on retail and wholesale customers in FairPoint's service territory. The Commission should not adhere to strict enforcement of a rule when doing so would undermine the agency's own purpose.¹⁰ Grant of the requested waiver would serve the public interest.

Finally, FairPoint reiterates its request for expedited action on the pending waiver request.

Respectfully submitted,



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¹⁰ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).